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Wishart, Andrew
The Behring Sea question.

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EXCERPT

FROM

TREATY FOR THE CESSION OF RUSSIAN-AMERICA TO THE UNITED STATES, SIGNED AT WASHINGTON, 30TH MARCH 1867. (RATIFICATIONS EXCHANGED AT WASHINGTON, 20TH JUNE 1867.)

ART. I. His Majesty the Emperor of all the Russias agrees to cede to the United States by this convention immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain of February 28–16, 1825, and described in Articles III. and IV. of said convention in the following terms:

"Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes north latitude and between the 131st and 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel as far as the point of the continent where it strikes the 56th degree of north latitude; from this last mentioned point the line of demarcation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and, finally, from the said point of intersection, the said meridian line of the 141st degree in its prolongation as far as the Frozen Ocean.

"IV. With reference to the line of demarcation laid down in the preceding article, it is understood—

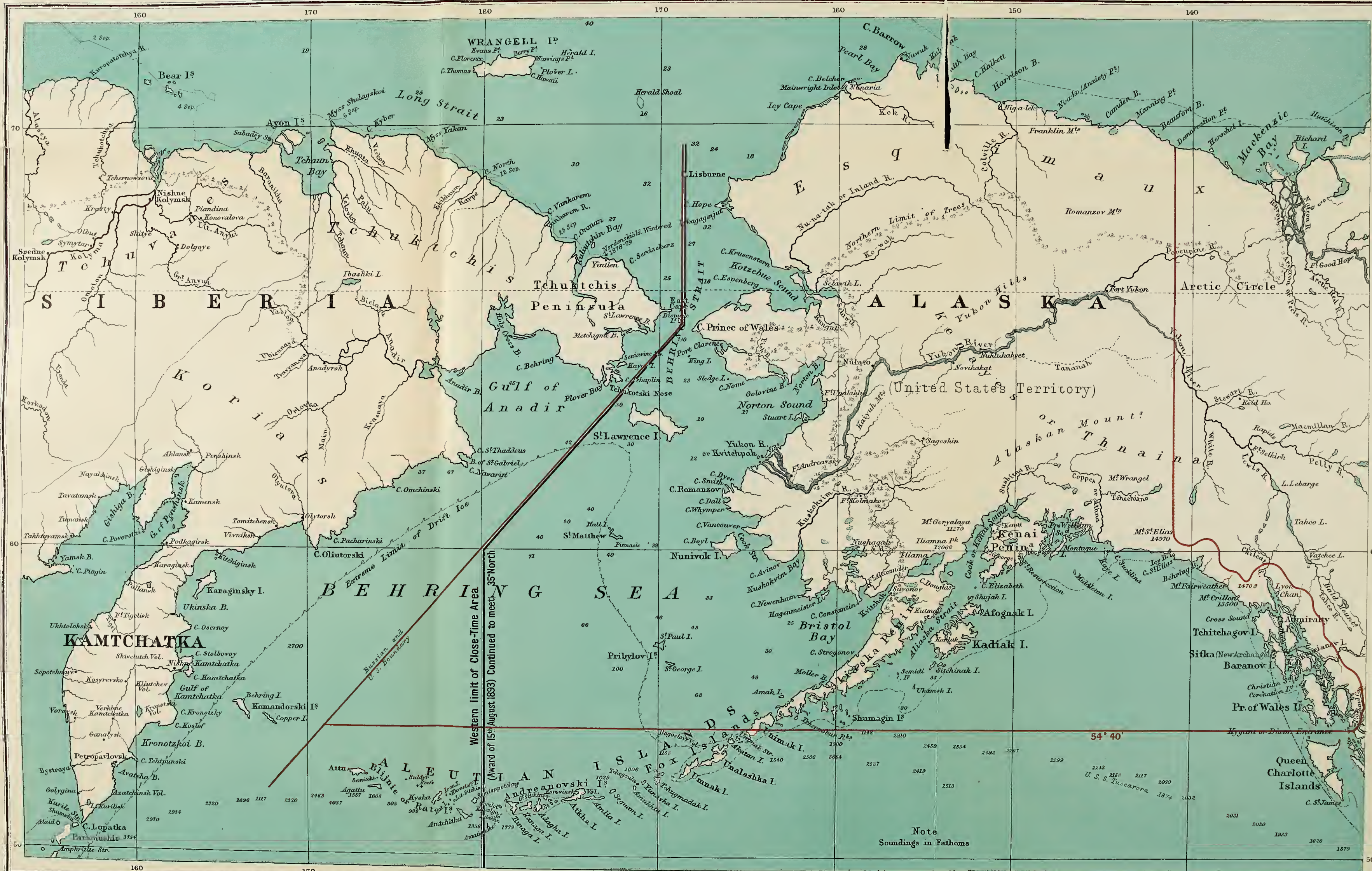
1st. That the island, called Prince of Wales Island, shall belong wholly to Russia (now by this cession to the United States).

2nd. That whenever the summit of the mountains, which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude, shall prove to be at a distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia as above-mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom."

The western limit, within which the territories and dominion conveyed are contained, passes through a point in Behring's Straits on the parallel of 65 degrees 30 minutes north latitude, at its intersection by the meridian which passes midway between the island of Krusenstern or Ignalook, and the island of Ratmanoff or Noonarbook, and proceeds due north without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly south-west through Behring's Straits and Behring's Sea, so as to pass midway between the north-west point of the island of St Lawrence and the south-east point of Cape Choukotski, to the meridian of 172 west longitude, thence from the intersection of that meridian in a south-westerly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific Ocean, to the meridian of 193 degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian.

MAP SHOWING ALASKAN TERRITORY CEDED BY RUSSIA TO THE UNITED STATES, 1867.

(See Excerpt from Treaty) ALSO WESTERN LIMIT OF CLOSE-TIME AREA FOR FUR SEALS, (Award of 15th August 1893)



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THE BEHRING SEA QUESTION

THE ARBITRATION TREATY

AND

THE AWARD.

WITH A MAP

BY

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THE BEHRING SEA QUESTION.

ONE summer afternoon, in 1786, a weary mariner commanding a listless crew lay becalmed and fogbound somewhere in Behring's Sea. His quest for the home of the fur-seal had been long and fruitless. Year after year, for generations, the native Aleutes had marked the passage of countless herds through the channels separating those islands which stretch like a long beckoning finger from Alaska to the confines of Asia. Northward the seals flocked in the spring, and in autumn back again to the Southern Sea, but the secret of their breeding-place was well kept. To find it, the Russian trading companies, whose indiscriminate slaughter had wellnigh extinguished the race of sea-otters, spent eighteen years in arduous exploration. South of the Aleutian Archipelago, from Oregon to Japan, the prospect of renewing that gainful traffic, which in another hemisphere had freighted Dutch and English argosies, led their captains over endless leagues of unprofitable ocean. They sought the supposed winter-quarters of the creatures. But one man, pondering over the legends of the islanders, noted a hint of some islands lying to the north of the Archipelago, and fancied it might point to their summer-home. He was destined to solve the mystery, and leave his name upon the charts of the world for a memorial of patient search rewarded. That afternoon Gerassim Pribylov and his idle crew heard, through a thick mantle of fog, the murmur of innumerable seals close at hand, and when the air cleared after three weeks of twilight, they were able to effect a landing upon one of the two islands which

formed the long-dreamt-of breeding-ground. Upon the other the explorers found traces of some earlier adventurers —"embers of drift-wood, a pipe, and a knife-handle of brass," the torn page, it may be, of some sad sea-tale that has never been given to the world. Whoever the earliest discoverers may have been, Pribylov and his crew were the first to take effective occupation of the islands, and ever since they have been best known as Pribylov's group, or the seal islands of Alaska. Individually, they are called St George and St Paul. Though only a pair of barren islets in a lone sea enveloped in perpetual summer fog, or ravaged by winter storms, they constitute the richest hunting-ground ever discovered by the fur-trader.

The Russian-American Company, organised in 1799 under a charter from the Emperor Paul, exercised throughout the whole region of North-West America a jurisdiction nearly as independent as that which the East India Company once enjoyed in India. It numbered among the shareholders Russian nobles, high government officials, and even members of the Imperial family. The governor, commanding a military and naval force, swayed the destinies of Alaska from New Archangel, now called Sitka, of which La Pérouse, who led the French Expedition of 1786, remarked that "nature seemed to have created at the extremity of America a port like that of Toulon, but vaster in plan and accommodation." The charter was renewed yearly. Finding themselves powerless to supplant these great corporations, the Americans of the Pacific coast, led by the Senators representing California, aimed at nothing less than buying up the Russian title to the Alaskan peninsula and the Aleutian islands. The expediency of this step had been urged by the legislature of Washington Territory in 1866; and in March of the next year, after the briefest negotiations, the treaty of cession was signed by Baron Stoeckel and Mr Seward. Russia ceded all the territory and dominion then possessed by her on the continent of America and in the adjacent islands, the same being contained within the geographical limits therein set forth. (See Map.) The price was fixed at 7,200,000

dollars. The duty of recommending the ratification of the treaty to Congress was entrusted to Senator Sumner, and that great orator discharged the office in a speech so comprehensive that a contemporary French writer said of it:—"All that is known of Russian-America has just been presented in a speech, abundant, erudite, eloquent, poetic, pronounced before the Congress of the United States." Although Congress approved the purchase by an almost unanimous vote, there were many short-sighted enough to deride the exchange of "seven millions of hard dollars against rocks, icebergs, and acres of snowy wastes."

Under this treaty of purchase all the Russian Government property, public buildings, wharves, and the like, were transferred to the United States, and it was expressly declared that the cession was free and unencumbered by any reservations or privileges conceived in favour of any associated companies. Certain buildings, however, as being the property of the Russian Fur Company, were reserved; and as to these Prince Matsukoff, who was at once the representative of the Russian Government and the governor of the company, proposed to negotiate with the United States Commissioner. The latter, however, very properly considered that his official position precluded him from treating for the private purchase of property so intimately connected with the territory which was in course of transfer to his Government. His private secretary, Mr Hutchinson, holding himself untrammelled by these considerations, concluded a bargain whereby he acquired the whole property of the Russian Fur Company. At Victoria (British Columbia), whither he had gone to arrange for taking possession of the seal islands, he met one Mr Kohl, with whose aid he constituted the famous firm of Hutchinson, Cole & Co. Thinking they had an exclusive right to the Pribylov Islands, they directed their first expedition thither, but found them occupied by experienced sealers under one Captain Morgan. The rival parties came to an agreement to divide the season's catch, and their union enabled them to repel another sealing

party, headed by the Russian Vice-Consul from Honolulu. In 1870 an Act of Congress was passed for the protection of the trade, which seemed to be falling a prey to indiscriminate competition. It was declared unlawful "to kill any fur-seal upon the islands of St George and St Paul, or in the waters adjacent thereto, except during the months of June, July, September, and October in each year." The lawful take was limited to 75,000 per annum upon the former island, and 25,000 upon the latter. The Secretary of the Treasury was by the same statute empowered to let "the right to engage in the business of taking fur-seals" on the islands to responsible parties for a rental not under 50,000 dollars per annum. A revenue tax of 2 dollars was also laid upon each fur-seal skin taken and shipped from the islands during the continuance of the lease. Meanwhile the coalition of Hutchinson, Cole & Co. with Morgan's party had developed into the Alaska Commercial Company, which in 1870 (the same year with the passing of the Act, and within one month of its final approval) obtained a lease of the islands for twenty years at a rent of 55,000 dollars, paying also 2 dollars 62 cents per skin. It is said that the company was aided by powerful political influence to secure this bargain. It certainly seems that a very brief period was allowed for public competition. Under this contract it is estimated that the company paid to the United States Treasury 315,000 dollars a year, "which, after paying all the expenses of the territory, yields more than 4 per cent. per annum on the purchase-money paid to Russia for Alaska." The company thus occupies the Pribylov Islands by virtue of a title from Congress. It also holds leases of certain other islands from the Russian Government; but it controls, by virtue of no title but the predominance of its own power and wealth, the fur-trade of a vast extent of sea and land. Its action has been graphically described by an American mercantile firm:—"This company, one of the most stupendous organisations that ever existed in this country, has taken possession of and assumed sovereign power over the most valuable fisheries of the whole United States; and without shadow of right or authority, except a

lease permitting it to kill 100,000 seals upon two small islands, has taken possession and control not only of the territory, but also of a vast sea 3,000 miles long by 2,700 miles wide, has made itself the suzerain of the Government, and impressed into its service the officers and agents of the Government to maintain its possession. Alexander the Great was not a robber although he absorbed kingdoms, and the Alaska Commercial Company is not a pirate although it has absorbed Alaska and an ocean."

In August 1886 the Admiralty Office received the following telegram, despatched by Rear-Admiral Sir M. Culme-Seymour from Victoria, British Columbia—"Three British Columbian seal schooners seized by United States Revenue cruiser *Corwin*, Behring's Straits, seaward 70 miles from off the land, killing female seals, and using fire-arms to do it, which they have done for three years without interference, although in company with *Corwin*." This brief message contains the essence of many pages of despatches in which the facts of the seizures are fully narrated. The three schooners, named respectively the *Carolina*, the *Onward*, and the *Thornton*, were fitted out in Victoria, British Columbia, for the capture of seals in the waters of the Northern Pacific Ocean, adjacent to Vancouver's Island, Queen Charlotte Islands, and Alaska. After their capture they were taken to Ounalaska, and laid up there. The captains and the mates were taken to Sitka, and tried before a District Judge. His charge to the jury amounted to this:—By the treaty of 1867, the United States acquired Alaska and the eastern part of Behring's Sea, in which the islands of St Paul and St George lie. The American law has, by special statute, forbidden the killing of fur-seals upon these islands, and in the waters adjacent thereto. If, therefore, the accused have killed seals in these waters, they are liable to the penalties imposed by the Act. The captains were sentenced to suffer imprisonment for thirty days, and to pay a fine of 500 dollars, the mates to a like term of imprisonment with 300 dollars of a fine. The crews of two of the vessels were sent to San Francisco, and there turned adrift. It is manifest that these convictions could

not have been obtained unless the "waters adjacent" to the islands had been held to include the open sea, at least seventy miles from their shores.

When we come to consider the lofty and able arguments presented by the American counsel to the Arbitration Court; when we hear Mr Phelps contending that even the great principle that the high seas are free to all men must yield to his country's claim, and Mr Carter urging that the Court must rise beyond mere consuetudinary law and invoke the law of nature, it will be well to have clearly in view the grounds upon which their judges rested their confident decisions. The seizure of foreign vessels and the conviction of foreign seamen were based confessedly upon their own municipal enactments. The indictment in the case of the *W. P. Sayward* ran:—"George R. Ferry and A. Laing (the master and mate) are accused . . . of the crime of killing fur seals within the waters of Alaska territory, committed as follows:—The said George R. Ferry and A. Laing on the 8th day of July 1887, in the District of Alaska and within the jurisdiction of this Court, to wit, in Behring's Sea, within the waters of Alaska territory, did kill ten fur-seals, contrary to the statutes of the United States, in such case made and provided, and against the peace and dignity of the United States of America."[1] The process was not brought before a prize tribunal for adjudication, as in a matter where international law was to be administered, but was prosecuted before an ordinary District Judge, who applied the ordinary municipal statutes. It is true that he seems to have felt the necessity of explaining in some way how the term "waters of Alaska" could be interpreted so as to include the open sea. He accordingly directed the jury in his charge that all the waters within the boundary set forth in the Treaty of 1867—the western boundary—were to be considered as covered by that designation. This was an invocation of a description so vague as to be meaningless, for the Treaty, as will be shown below, conveys no sea and contains no *termini habiles* for delimiting any sea. But for the present purpose it is enough that the indictment was

[1] See sections 1956, 1960, and 1961 of the U.S. Revised Statutes.

based upon nothing else than the provisions of the municipal law. There never was a plainer case of deliberate assumption of municipal jurisdiction. After convicting the unhappy mariners, and despoiling the owners upon such grounds, it is only with an ill grace that the American Government can turn round and pose as the upholders of an unwritten natural law. Then the vessel was restored to the owners upon condition that they prosecuted an appeal to the Supreme Court of the United States from the Alaska District Court, and granted bond to provide for the contingency of the appeal being unsuccessful. But the mere act of giving such a bond involved the admission that the Courts of the United States had jurisdiction in regard to the seizure, and that the municipal law of the United States applied to a vessel seized for plying her trade in waters over which the Executive and Judiciary of the United States have and can have no effectual control. Nor can it be pleaded that the rash ignorance of a District Judge alone pledged the United States to maintain this high ground. Five years afterwards, when the *Sayward* appeal came before the Supreme Court at Washington, there arose the fairest opportunity for reconsidering the constitutional question whether the seizure was not grossly *ultra vires* of their officers. Then was the occasion for considering, upon general and lofty grounds, whether American revenue cruisers were entitled to molest fishermen following their lawful occupation on the high seas, for considering whether those fishermen were properly compelled to seek redress in the courts of a foreign country, for considering whether the American courts could have any more rightful cognisance of the wrong charged against them than the courts of any other foreign country. It is quite true that the application before the Court was not, properly speaking, an appeal. It was a motion for a "writ of prohibition," the object of which it is presumed was to annul the operation of the District Court judgment. But the Supreme Court fled from the real question, and held that, as the owners did not *ab initio* question the jurisdiction, the application was bad. On the mere technical ground that the objection to the jurisdiction did

not appear on the face of the record, they threw away the opportunity of basing their action on wider principles than the mere suppression of poaching on American preserves. They did so at the very moment when their Secretary of State was putting his hand to the Arbitration Treaty,[1] and instituting a tribunal before which the record of a happier *ratio decidendi* would assuredly have stood them in good stead.

To the protests of Great Britain and Canada against the assertion of sole sovereignty, Mr Bayard, even in January 1887, could only reply that he had not been placed in possession of that accurate information which would justify his coming to a decision upon the question. Further delay in the diplomatic correspondence made the Canadian sealers anxious to ascertain whether it would be prudent to fit out vessels for the season of 1887. In the absence of any explicit assurance as to the United States' intentions, the sealers drew their own conclusions from Mr Bayard's despatch of 3rd February 1887. It announced that, "without conclusion at this time of any questions which may yet be found to be involved in these cases of seizure, orders have been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith." At this juncture, a failure occurred in the machinery of the American Executive that contrasts strongly with the promptitude shown immediately before. The United States Marshal for the district of Alaska took no action upon these peremptory orders. One version of the story has it that the District Judge, conceiving the telegraphic despatch to be a forgery, took it upon himself to rescind the order he had transmitted to the Marshal. Another account bears that the Judge, as late as July, admitted that he had heard some rumour about this despatch before, but declared that nothing of the kind had reached either himself or the Marshal. Be that as it may, no steps were taken for the release of the vessels, and even in September there they lay worm-eaten and damaged upon the beach at Ounalaska. That this

[1] See Appendix.

officer should have assumed that an order issued from Washington in the name of the Attorney-General — an order touching a matter of international import—was a mere invention; that he should have allowed eight months to pass without making any attempt to verify his assumption, would be incredible, were it not that the equally marvellous counterpart of the incident is established beyond a doubt. We find the American Secretary of State himself showing not the slightest perturbation over the miscarriage of the President's command, and contenting himself with a tardy renewal of the order, and a curt expression of regret towards the injured State. Queer lapses like these lend an air of truthfulness to the vivid pictures drawn by some American writers to show the all-pervading political influence of the Alaska Company.

The British Columbians, viewing Mr Bayard's announcement as a departure from the policy of repression, sent thirteen vessels to the sealing-grounds in the summer of 1887. Six of them were seized. Of these the *W. P. Sayward* became the most noted. She commenced sealing in the Pacific Ocean, but, on entering Behring's Sea, was prevented by constant fog from capturing a single seal. Thirty miles from land, however, she was seized and taken in tow to Ounalaska, and thence to Sitka. The vessel was left in charge of the United States officers, the crew being allowed to remove nothing but their clothing. The Indians who formed part of the crew were left to find their way as best they could to their homes, 700 miles distant. The master and mate were bound over to appear for trial on 22nd August. They attended accordingly, and day by day thereafter till the 9th of September, when, without having been tried upon any charge whatever, they were unconditionally released. Nor were these stern measures meted out to foreigners alone. Schooners owned by Americans, and registered under the American flag, were subject to the same treatment. The *San Diego*, owned in San Francisco, was seized, taken to Sitka and condemned, her cargo of seal skins taken in the open sea was confiscated, and her owners' petition for redress ignored.

Hear the plaintive accents of Americans pleading for freedom for their own fishermen: "They wish to explore the waters of Behring's Sea and the Arctic Ocean. They believe that they, as American citizens, have a right to fish or hunt in the American waters of the Behring's Sea outside of three nautical miles from any island or the mainland of Alaska. They believe that William H. Seward did not purchase Alaska for the Alaska Commercial Company, but for the whole nation. They demand, as a right, that they be permitted to pursue their honourable business in the American waters of the North Pacific, Behring's Sea, and the Arctic Ocean, without being treated as criminals, and hunted down and seized and imprisoned by the piratical Revenue cutters of the United States, at the dictation, and for the sole benefit of, the Alaska Commercial Company."

One hesitates to quote further from American denunciations of their own national policy, because Mr Phelps has wept bitterly over them. He tells his countrymen through his tears that all their arguments are carefully filed in the pigeon-holes of the British Foreign Office, and that American diplomatists are faced at every turn with shafts drawn from American quivers. How wise are the English! he cries; not a word is published in the British press, not an article in a Review is written to impede the march of Lord Salisbury's argument. Mr Phelps might have gone further, and added that not a single foreign writer or diplomatist has found a good word to say for the American case. It is perhaps to be regretted that his compliment, if meant to ascribe a general attitude of patriotic reticence to our own press, must be disclaimed. Nowhere in the world do we find journalists so ready to impugn the foreign policy of their own State as are those of England. If it be otherwise in this instance, it must be due to some inherent quality of the American claims. But this dread of public discussion is worthy neither of Mr Phelps nor of the question in hand. The rash announcement of preliminaries may, no doubt, stop the ratification of a treaty. For example, had some indiscreet official at the American Legation revealed

the secret assurance, which, as will be seen immediately, was given by the United States Minister in 1888, there might have been some cause for complaint, but in a debate where the issue depends upon the examination of historical facts and of legal precedents, it is surely puerile to shun the light of free criticism.

Before the season of 1888 opened, it was rumoured that British sealers were fitting out and were arming to resist capture. At this point another blot disfigures the American record. The United States Minister had an interview with Lord Salisbury on 3rd April 1888, at which he read this extract from a private letter he had received from Mr Bayard,—"I shall advise that secret instructions be given to American cruisers not to molest British ships in Behring's Sea at a distance from the shore, and this on the ground that the negotiations for the establishment of a close time are going on." The Minister added that it was very desirable that the step should not become public, as it might give encouragement to those who were destroying the fishery. In point of fact, these orders were obeyed, and during the season of 1888 the sealers were not interfered with. But in 1889, without a word of warning that the policy of the preceding season was to be reversed, the seizures began anew, and not a word of explanation of the *volte-face* was ever subsequently vouchsafed.

By the end of 1889 the British claims preferred against the United States for compensation in respect of vessels seized had amounted to upwards of 500,000 dollars, irrespective of the personal claims of the crews for redress for the wrongs they had suffered. In June 1890, Her Majesty's representative at Washington, having failed to obtain any assurance that, pending the negotiations between the two countries, British sealing vessels would not be further interfered with, and finding that cruisers were again commissioned, lodged a formal protest against their action, and intimated that we should hold the United States responsible for the consequences that might ensue. The American Secretary lashed himself into fury. He protested in turn "against the course of the British Government in authoris-

ing, encouraging, and protecting vessels which were not only interfering with American rights in the Behring's Sea, but which were doing violence as well to the rights of the civilised world." He reviewed the progress of the intercourse between the Foreign Office and the American Minister, between November 1887 and April 1888, upon the subject of a close time, and declared that, after the assurances — "the pointed assurances"—given by Great Britain, the United States had no reason to doubt that the whole dispute touching the seal fisheries was practically settled.

The charge against our good faith is worth looking into. What were these assurances? Mr Phelps, in February 1888, pointed out that the female seals, in their migration northward in spring, are far advanced in pregnancy; that it is impossible to distinguish the male from the female in the water; that when the animals are killed in the water with firearms, many sink at once and are never recovered. He consequently suggested that a close time should be agreed on—a consummation which he expected would suffice to solve the whole question. He urged the necessity for the utmost despatch, in order to preserve the fur-seals from extermination, but he admitted that no more than the first steps towards this end could be taken meantime, because under the peculiar political circumstances of America at that moment, with a general election impending, it would be hardly practicable to conduct any negotiation to its issue before the election had taken place. In a conversation which took place between Lord Salisbury and Mr Phelps on the 22nd of the same month, the former expressed the entire readiness of Her Majesty's Government to join in an agreement with Russia and the United States to establish a close time north of some latitude to be fixed. Mr Phelps, writing to Washington three days later in a somewhat sanguine mood, appears to have represented that we had absolutely and finally accepted the American proposals *en bloc*, and the conversation is afterwards dignified by the American Secretary with the title of "the Agreement of 25th February." Lord Salisbury, besides assenting to the

suggestion that a close time should be established, suggested certain regulations to be embodied in a Convention to that end, but he was most careful to define them as merely provisional, and intended only to serve as a basis for negotiation, without definitively pledging either party. Let it be granted that he also undertook to draft and introduce a Bill into Parliament to give effect to the Convention when it had been adjusted. Mr Phelps, or his subordinate, seems to have thought it possible that the British Government could, by an Order in Council, interdict British and Canadian sealers from entering Behring's Sea as promptly as the President could stop the action of his cruisers. In order to remove all possibility of misapprehension on this head, it was explained by letter, dated only a few days after this interview took place, that no convention could be concluded until the opinion of Canada upon it should have been ascertained; that after the Convention should be signed, an Act of Parliament would be necessary to enable the Executive to act upon it; and that the Order in Council would be only the machinery for bringing the Act into operation. The American Presidential Election then supervened, the formation of a new Cabinet at Washington hindered further progress, and in point of fact serious negotiations were not reopened until the month of February 1890. It will hardly be credited that these, and nothing more than these, were the grounds upon which the Secretary concluded that the whole dispute was practically settled! These were the *assurances* which prompted him to exclaim with indignation:—"Lord Salisbury would have dealt more frankly if in the beginning he had informed Minister Phelps that no arrangement could be made unless Canada concurred in it, and that all negotiation with the British Government direct was but a loss of time." This was the *agreement* between the representatives of the two Powers which England had basely broken off simply because Canada objected. Suppose we had maintained that Mr Bayard's despatch of 3rd February 1887, directing the captured vessels to be discharged, was an avowed abandonment of the whole American position, and suppose we had wilfully ignored his express reservation

of all questions which might be found to be involved in those cases of seizure, should we not have been told, and forcibly told, that we could not be permitted to fasten just upon that part of the declaration which suited our argument, and disregard the rest? Our sophistical pretension would have been deservedly silenced by the immediate withdrawal of the United States from the whole negotiations. But our assumption would have been no more unfair and unfounded than is the American inference in this instance. Not the most minute examination of the American Secretary's own despatch will reveal one single point on which any agreement had been reached, except the expediency of instituting some regulations for the protection of the animals during their breeding season. We are left to wonder how so acute a reasoner could attempt to raise a grave charge of bad faith upon so frail a foundation.

But since it was our deference to the wishes of Canada that excited such intense disgust in the American official mind, it is proper to examine the terms of the Convention proposed and the grounds of the Canadian objection. Mr Bayard's proposal was that the close time should extend from the 15th of April to the 1st of November in each year, and that sealing should be forbidden in the waters lying between America and Russia north of the 50th degree of north latitude, and between long. 160° west and 170° east of Greenwich. Now, to begin with, there was surely something misleading in the way the United States Minister presented the matter. In urging that an agreed-on close time would solve all the difficulties of the question, he put it that no attempt had been made by his Government to stop the fishing during the time it was legitimate. That may be true regarding their action. But the fact remains that, by the express enactment of the United States statute-book, no person whatever is permitted at any season of the year to kill a single seal in the waters which they claim as a private domain. Further, if it be considered that the seals enter Behring's Sea in May and leave in October, it is evident that so far as the interests of Canadian sealers were concerned, the close time might as well have been fixed to

cover the twelve months between 1st January and 31st December. Again, this proposal takes no account of the powers which the United States tacitly reserved to themselves to continue during the close time the practice of killing the seals on the islands.

In the early stages of the diplomatic correspondence there was much stress laid on the historical record of Russia's sovereignty in this region, and some reference was made to the dicta of international jurists upon the doctrine of *mare clausum.* President Harrison in his Message to Congress of 1890 described his country's claim as a "property-right derived from Russia." Russia in 1821, being then in possession of both shores of Behring's Sea, issued an edict in which she undoubtedly based her right to restrict the liberties of foreign vessels in that sea upon the theory that it was land-locked. It was assumed, both by our Foreign Office and by American jurists, that the present American claim rested upon the same basis, and both set themselves to demolish it.[1] But in the end Mr Blaine vehemently repudiated that inference and abandoned the doctrine in express terms. How it came about that, both on this side of the Atlantic and on the other, writers so unkindly attributed the use of this rusty weapon to the Washington State Department does not very clearly appear. The declamatory despatches which reached us from the other side were certainly not well suited to convey a clear statement of a legal claim. It is indeed impossible not to sympathise with Sir Julian Pauncefote when he exclaims, so late as July 1890, that he has some difficulty in clearly apprehending, even after all the correspondence which had taken place, the precise proposition of law on which the United States Government relies in justification of its claim to exclude all other nations from the fur-seal fishery. Even in 1891 Mr Blaine found it necessary to instruct us that "the advisers of the President do not rely as justification

[1] Even Mr Phelps appears to have been misled, for we find him writing in April 1891 :—"The Secretary of State in his correspondence with the British Government on this subject has undertaken to maintain that these waters are not, as between that country and the United States, a part of the high or open sea."

for the seizure of British ships in the open sea upon the contention that the interests of the seal fisheries give the United States any right for that purpose which, according to international law, it would not otherwise possess. The Government of the United States holds that the ownership of the islands upon which the seals breed, that the habit of the seals in regularly resorting thither and rearing their young thereon, that their going out from the islands in search of food and regularly returning thereto, and all the facts and incidents of their relation to the island, give to the United States a property-interest therein ; that this property-interest was claimed and exercised by Russia during the whole period of its sovereignty over the land and waters of Alaska ; that England recognised this property-interest in so far as recognition is implied by abstaining from all interference with it during the whole period of Russia's ownership of Alaska, and during the first nineteen years of the sovereignty of the United States." It is undeniable that this statement shows a very different complexion of the case from that originally presented, but it was to this aspect that the American Counsel in the late arbitration mainly devoted their attention. Mr Carter, indeed, drew a touching picture of the tender solicitude which the United States had always shown for the welfare of the seals—a picture which must have recalled to the minds of the Arbitrators his countrymen's well known anxiety for the protection of other rare species in the animal world—a loving care which has secured a lineal and undiminished succession for the buffalo and the beaver. It is therefore necessary, before discussing the legal bearing of this " property-interest," or the validity of the contention that it was derived from Russia, to say a word in explanation of the seal-habits and of the Alaska Company's method of taking the island-catch.

The female seals seek the shores of the islands for the purpose of giving birth to their young. The pups are born soon after the mothers land in May. The strongest bulls, polygamous in habit, establish their rights to adequate harems by dint of hard fighting with less doughty champions.

They maintain their posts during the whole summer, driving off every male that seeks to cross the boundary of their seraglios. One-third, however, of the millions which line the shores are bachelors. These are males under six years of age. The old bulls jealously exclude them from the breeding-grounds, and leave them only an option of congregating on the beaches where no cows are, or upon the higher grounds to the rear of the family resorts. It is this class of bachelors, known as *kolluschickie*, which the natives and the employés of the Alaska Company slaughter. The method is thus described by Professor Elliott, who, in 1873, wrote an elaborate monograph upon the Seal Islands.[1] He is the chief American authority on the subject, and one who had certainly no bias against the Company. "A dozen Aleutes running down the sand-beach of English Bay in the early morning of some June day will turn back from the water thousands of seals, just as the mould-board of a plough lays over and back a furrow of earth. They then leisurely on the flanks and in the rear of this drove thus secured, directing and driving it over to the killing-grounds." The seals "are urged along over paths leading to the killing-grounds with very little trouble, and require only three or four men to guide and secure as many thousands at a time. They are permitted frequently to halt and cool off, as heating them injures their fur. When the men drop back for a few moments, that awkward shambling and scuffling of the march at once ceases, and the seals stop in their tracks to fan themselves with their hind-flippers, while their heaving flanks give rise to subdued panting sounds. As soon as they apparently cease to gasp for want of breath and are cooled off comparatively, the natives step up once more, clatter a few bones with a shout along the line, and this seal-

[1] It is true that an English reviewer once justly said of this work :—"The language is the purest American—the tongue that our descendants are perhaps one day to speak—but it is needless to anticipate an evil." Yet the style is graphic and well suited to the subject. Mr Elliott is specially happy in his epithets. It was he who applied to the Aleutian islands the words "firm pelagic boundary," a phrase so attractive that everybody seems to enjoy using it, and which is perhaps to blame for the vile imputation of antiquated *mare clausum* tenets to the United States' diplomatists.

shamble begins again—their march to death and the markets of the world is taken up anew. As this drove progresses along that path to those slaughtering-grounds, the seals all move in about the same way; they go ahead with a kind of walking step, and a succession of starts, spasmodic and irregular, made every few minutes, the seals pausing to catch their breath, making as it were a plaintive survey and mute protest. Every now and then a seal will get weak in the lumbar region, then drag its posteriors along for a short distance, finally drop breathless and exhausted, quivering and panting, not to revive for hours—days perhaps—and often never. This prostration from exhaustion will always happen, no matter how carefully they are driven, and in the longer drives as much as 3 or 4 per cent. of the whole drive will be thus dropped on the road; hence I feel satisfied, from my observation and close attention to this feature, that a considerable number of those that are thus rejected from the drove, and are able to rally and return to the water, die subsequently from internal injuries sustained on the trip, superinduced by this over-exertion." On arrival at the killing-grounds the natives brain the creatures with bludgeons. "The aim and force," says Mr Elliott, "with which the native directs his blow determines the death of a fur-seal. If struck direct and violently, a single stroke is enough. The seals' heads are stricken so hard sometimes that those crystalline lenses to their eyes fly out from the orbital sockets like hail-stones or little pebbles, and frequently struck me sharply in the face, or elsewhere, while I stood near watching a killing-gang at work." It does not appear that any care is exercised to keep the slaughter of the bachelors a secret from their happier kinsfolk, for Mr Elliott says:—"We see the Lagoon rookery, a reach of ground upon which some twenty-five or thirty thousand breeding-seals come out regularly every year during the appointed time, and go through the whole elaborate system of reproduction without showing the slightest concern for or attention to the scene directly east of them, and across that shallow slough not 80 feet in width. There are the great slaughtering fields of St Paul Island; there are the sand

flats where every seal has been slaughtered for years upon years back for its skin ; and, even as we take this note, forty men are standing there knocking down a drove of two or three thousand bachelors for their day's work, and, as they labour, the whacking of their clubs and the sound of their voices must be as plain to these breeding seals, which are not 100 feet from them, as it is to us a quarter of a mile distant. In addition to this enumeration of disturbances, well calculated to amaze and dismay and drive off every seal within its influence, are the decaying bodies of the last year's catch—seventy-five thousand or eighty-five thousand unburied carcases—that are sloughing away into the sand which two or three seasons from now Nature will, in its infinite charity, cover with the greenest of all green grasses." It is surely clear that the practical effect of prohibiting seal-fishing, or "pelagic sealing" as it is called, while this work went on ashore, would have been to concede the American demands and shut out the Canadian claims. The institution of a close time on the lines proposed would have given the Americans all the sea they want, all the time they want, and the benefit of a close season debarring everybody but themselves.

But what are the American objections to pelagic sealing? They rely upon the opinions of the experts to show that the process is so destructive that it will bring about the immediate extermination of the species. Of these authorities Professor Elliott is the chief. He thus proceeds to prove his case in a letter written to Mr Bayard in 1887:—"As these watery paths of the fur-seal" (from the Aleutian passes) "converge in Behring's Sea, they in so doing rapidly and solidly mass together thousands and tens of thousands of widely scattered animals (as they travel) at points 50 or even 100 miles distant from the rookeries of the Seal Islands. Here is the location and the opportunity of the pelagic sealer. Here is his chance to lie at anchor over the shallow bed of Behring's Sea, 50 or 100 miles distant from the Pribylov group, where he has the best holding-ground known to sailors, and where he can ride in any weather, safely swinging to his cable. . . . He has

a safe and fine location from which to shoot, to spear, and to net these fur-bearing amphibians, and where he can work the most complete ruin in a very short time. His power for destruction is still further augmented by the fact that those seals which are most liable to meet his eye and aim are female fur-seals which, heavy with young, are here slowly nearing land, reluctant to haul out of the cool water until the day and hour arrives that limits the period of their gestation. The pelagic sealer employs three agencies with which to secure his quarry, viz., he sends out Indians with canoes and spears from his vessel; he uses rifle and ball, shot-guns and buckshot; and last, but most deadly and destructive of all, he spreads the gill-net in favourable weather. With gill-nets underrun by a fleet of sealers in Behring's Sea across these converging paths of the fur-seal, anywhere from 3 to 100 miles southerly from the seal islands, I am extremely moderate in saying that such a fleet could and would utterly ruin the fur-seal rookeries of the Pribylov Islands in less time than three or four short seasons."

It cannot be denied that this sketch of pelagic sealing, drawn to convince us of its wanton destructiveness and to excite our condemnation of those engaged in it, suffers greatly from being placed alongside that other picture of seal-killing on land. The seal hunter in his canoe with his spear or gun, or even the crew of the schooner with their net, seem a much less destructive agency than the men with the clubs who drive the animals by thousands to their killing-grounds. It is certain that the latter, engaged in a work that requires no spark of courage, exhibits no element of skill, suggests no sentiment of romance, are not likely to arouse much sympathetic interest. When Mr Phelps, throwing all stricter arguments behind him, appeals to "the laws of all civilised nations based upon the ordinary dictates of humanity," we cannot forget the disgusting scene of brutality and butchery at English Bay. Civilisation and humanity! What are they to the men who turn into torture-grounds and shambles the very spots which should be sacred to the rites of propagation and maternity? What

veneration for those dictates can those men cherish who employ the semi-savage Aleut in forcing a beast that is half a fish to flounder over miles of dry land? Professor Elliott quotes from Ovid. To Ovid let him go once more, and mark a passage he has missed:

> Omnia pontus erat: deërant quoque littora ponto.
> Occupat hic collem: cymba sedet alter adunca,
> Et ducit remos illic, ubi nuper ararat.
> Ille supra segetes, aut mersae culmina villae
> Navigat: hic summa piscem deprendit in ulmo
> Figitur in viridi (si Fors tulit) anchora prato;
> Aut subjecta terunt curvae vineta carinae
> Et, modo qua graciles gramen carpsere capellae
> Nunc ibi deformes ponunt sua corpora phocae.
>
> *Metam.*, lib. I., 292–300.

With this before him, the Professor might have denounced his countrymen for seeking to bring back the age of Deucalion and Pyrrha, for trying to reproduce (*si parva licet componere magnis*) the incidents of that grand cataclysm, which threw into confusion all the orderly reign of Nature.

It is unnecessary to say that no man more than an Englishman abhors the slaughter of any wild animal during its pregnancy. It was simply because he intimated a ready and hearty concurrence in the American desire to take measures to stop this that Lord Salisbury found it assumed that he had settled the whole question. But even if the fishers are proved guilty of unavoidably killing a certain percentage of seal-mothers, it is a very rash assumption that this is now or ever will be sufficient to ruin the rookeries. In all the historical instances adduced of seal-rookeries destroyed by indiscriminate slaughter in the South Pacific Islands, on the Falkland Islands, on the coasts of Chili and South Africa, surely never could the operations of hunters 10 or 20 miles from land be the cause. The premises laid down by Professor Elliott in his letter of 1887 for the conclusions he had then arrived at are obviously weak. "These watery paths converging," he says, "rapidly and solidly mass together thousands and ten thousands of widely scattered animals." What can he mean by that? If he means that the seals travel in close-packed droves, he can

be contradicted out of the mouth of the Secretary of the United States Treasury, who, twenty years ago, refused to exclude Australian sealers, and justified his refusal by quoting an expert's opinion that pelagic sealing would not pay, "inasmuch that the seals go singly or in pairs, and not in droves, and cover a large region of water in their homeward travel to these islands." If, on the other hand, he means what he says, namely, that the animals are widely scattered, how can the sealers, even with the dreaded gill-nets, work the wholesale ruin he has pictured? The seal is notoriously a most difficult animal to take at sea. It is said that 2500 seals is an exceptionally good catch for a vessel carrying twenty-one men during a season of seven or eight months—figures which of themselves are enough to demonstrate the real skill needed by the seal-fisher, and the improbability of that mode of capture ever exterminating the species.

But Professor Elliott, himself, has lived to see the land operations in a new light. As special agent for the American Government, he was despatched to the islands in 1890, and in a letter submitting his report he states his recantation.[1] "I can see now, in the light of the record of the work of sixteen consecutive years of sealing, very clearly one or two points which were wholly invisible to my sight in 1872–74. I can now see what that effect of driving overland is upon the physical well-being of a normal fur-seal, and upon that sight feel warranted in taking the following ground. . . . When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then, when driven up

[1] It would probably be unfair to give credence to the following story which professes to account for Mr Elliott's new point of view. "Professor Elliott was formerly the paid agent in Washington of the Alaska Fur Seal Company. When the sealing contract was lost by that company and given to the North American Company, Professor Elliott made use of every opportunity to attack the latter. Not knowing this, the Secretary of the Treasury sent him as an expert to the seal islands; but when it was found that his report was an attack upon the North American Company, Mr Blaine requested Mr Foster to withhold the report indefinitely."

into the last surround or 'pod,' if the seals are spared from cause of being unfit to take, too big or too little, bitten, &c., they are permitted to go off from the killing-ground back to the sea, outwardly unhurt, most of them, but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a station on the rookery, even if it can possibly run the gauntlet of driving throughout every sealing season for five or six consecutive years; driven over and over again, as it is during each one of these sealing seasons. Therefore it now appears plain to me that those young male fur-seals which may happen to survive this terrible strain of seven years of driving overland, are rendered by this act of driving wholly worthless for breeding purposes —they never go to the breeding-grounds and take up stations there, being utterly demoralised in spirit and in body. With this knowledge, then, the full effect of 'driving' becomes apparent, and that result of slowly but surely robbing the rookeries of a full and sustained supply of fresh young male blood, demanded by nature imperatively for their support up to the standard of full expansion (such as I recorded in 1872–74)—that result began, it now seems clear, to set in from the beginning, twenty years ago, under the present system." The report proves that, whereas in 1874 there were over three millions of seals on the islands, they had fallen in 1890 to less than one million, and infers that, as the sea-catch only amounts to 60,000, pelagic sealing cannot be held responsible for the whole of the reduction. One is at a loss whether more to admire the candour that marks the true man of science, or to wonder at the short-sightedness which years before could see nothing of the tendency of this brutal method of capture. To any man with a feeling of compassion for dumb creatures, or even only a sportsman's instinct for fair play, the end of this revolting practice ought to have been clear as noonday. Professor Elliott pours his sarcasm upon the Treasury agents who have regularly since 1874 reported that the

rookeries were in splendid condition, and condemns their purblindness in failing to note the diminution in the supply of young males. A recollection of the failure of his own insight in 1874 might have led him to temper his censures.

The discussion of the legal aspect of the claim to a "property-interest" in the seals raised the most novel, and not the least interesting points in the question. The Roman law recognised a distinction between absolutely wild animals and those that were half tamed. The former were liable to capture at all times, except when they were in someone's actual effective possession. The latter (including, for example, deer, bees, and pigeons) were regarded as still remaining in the possession of an owner, though they might be beyond his immediate grasp, if only they exhibited the habit, and, inferentially, the intention of returning to the hands which cared for them.[1] The American Counsel claimed that these rules supported their case. It was contended that the seals had been brought under control upon American soil, to which they had the constant *animus revertendi*, and where they had become the subject of an industry; that they had thereby become appurtenant to the soil, and ought to be regarded as American property, and entitled to protection wherever they might roam. But the authority just quoted indicates two considerations which seem to displace this contention. The foundation of the *animus revertendi* doctrine is the presumption that the half-tamed animal will return to the spot where it is fed or sheltered, and the object of the rule is to protect the interest of him who cares for the animal against the

[1] Gaius, ii., *Adquisitiones Dominii Naturales.*—§ 67. Wild beasts, birds, and fishes, as soon as they are captured, become, by natural law, the property of the captor, but only continue such so long as they continue in his power; after breaking from his custody and recovering their natural liberty they may become the property of the next occupant; for the ownership of the first captor is terminated. Their natural liberty is deemed to be recovered when they have escaped from his sight, or, though they continue in his sight, when they are difficult to recapture.

§ 68. Regarding those wild animals, however, which are habituated to go away and return (as pigeons, and bees, and deer, which habitually visit the forests and return), the rule has been handed down, that only the cessation of the instinct of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the instinct of returning is held to be lost when the habit of returning is discontinued.

aggression of those who only covet it. Again, the limitation of a captor's right, by his actual possession, or, at least, by his power of easily and immediately regaining possession, is based on this most wholesome application of the *de facto* principle. Law can take account only of what a man really has. It can only declare that to be his which he has made and continues to keep as his own. It has to do with the actual, not the hypothetical. Tried by these tests, the claim so eloquently urged by Mr Carter must fall. During their stay on American territory the seals take no sustenance whatever from the soil; and far from being tended or sheltered, they are compelled, in return for the mere foothold they occupy on the shore, to yield a tithe of their kind. When they forsake the land all pretence of any man's having any actual or constructive control over their movements becomes out of the question. They at once become the wildest and wariest of all *ferœ naturæ*. They escape from sight. All but a remnant defy recapture, and plough their pathless way to the unseen ocean-haunts where the winter half of their double life is spent. The American Orpheus must sing sweeter strains than these before he wins for all the year his "half-regained Eurydice."

It is to the credit of Mr Phelps that he has made the ablest effort to place the American claims upon a higher ground than the Russian edict of 1821. "This colony of seals," he said, in a contribution to periodical literature, "making their home on American soil, and unable to exist without a home upon some soil, belong to the proprietors of the soil, and are a part of their property; and do not lose this quality by passing from one part of the territory to another, in a regular and periodical migration necessary to their life, even though, in making it, they pass temporarily through water that is more than three miles from land." And if in their passage they become the victims of a wanton destruction, Mr Phelps thinks the resources of scientific jurisprudence should provide a remedy. "Doubtless some lawyers," he says, "would be prepared to demonstrate that much as the calamity might be deplored, there was really no precedent to be found in the books for any

interference to prevent it, because no such wrong had ever been attempted before, and to point out that to proceed without a precedent would be to set all jurisprudence at naught. Precedents illustrate principles, but do not create them. They are only valuable so far as they display the application of principles to new cases. They do not arise out of rights but out of attempted wrongs. A right cannot obtain the sanction of a precedent until it is invaded. And an invasion of a right is not without redress, though it may never have been invaded in the same way before. There must always be a first case, but not necessarily therefore a remediless case. When the case arises that justifies a precedent, the occasion for making it should be availed of for the sake of the law as well as for the sake of the right." This is wholly admirable. This lofty conception of the principles that ought to guide international jurists is in entire harmony with the teaching of the late Professor Lorimer, and higher praise it can hardly hope to win. It rises above the beggarly doctrine that only those rights can be recognised and protected which have been already conferred by the law as it is. It points to the true principle that the business of the law is not to confer but to mark and proclaim a right which a previous analysis of the facts of the case has revealed. Lorimer's thesis was that no law can constitute, extend, or circumscribe a proprietary relation. It can really do nothing but declare the true relationship of the proprietor towards the thing possessed, and towards his fellows who may have subsidiary rights in that possession. If, then, no positive international law can, scientifically speaking, *confer* the right to capture the denizens of the open sea, the law which professes to *declare* that right as really existing may quite well be founded on an incomplete analysis of the facts. The positive law of the relation may be in antagonism with the natural law of the relation, but that is an antagonism which may be eliminated, and, as the Duke of Argyll has well said, must be eliminated if legislation is ever to be attended with permanent success.[1] The first step towards determining the natural law which applies to the

[1] *Reign of Law*, p. 355.

present case, and so discovering the terms of the positive law which ought to declare the rights of the contending parties, is to ascertain precisely the habits of the animals themselves. This is apparent from the very statement of the American case, and, although the territorial claim of the United States was earnestly urged as sanctioned by history and prescription, and as strenuously denied by England, who looked to history and prescription for its refutation, yet it was recognised, even in the Arbitration Treaty, that the mere settlement of the questions of territory and jurisdiction would not suffice to dispose of the difficulty. Each Government accordingly agreed to appoint two Commissioners to investigate, conjointly with the Commissioners of the other Government, all the facts relating to seal life in Behring Sea, and the measures necessary for its proper protection and preservation.[1] With the report of this Joint Commission to guide them, the Arbitrators were empowered to determine what concurrent regulations, outside the 3-mile limit, should be laid down, and over what waters they should extend. Unfortunately the differences of opinion which arose between the American and the English Commissioners, rendered it impossible for them to embody any but comparatively unimportant conclusions in their joint report, and it may consequently be doubted whether their inquiries have made the natural history of seal-life much more exact than it was before. Besides the lack of an accurate basis of fact to build upon, there is one other consideration almost sufficient to deter anyone from suggesting a rule of positive law that claims to declare the true natural relation that ought to govern the present issue. Natural law, we are told, is dead and buried, it is scouted as a fiction. In a connection very near to this it is blamed for having exercised "a disastrous power over the international concerns of Canada." Whether it is more thoroughly discredited than the theories which base positive enactment on utility or philanthropy is a question for the schools. It is not pretended that natural law in a case like the present will indicate the exact limits within which the American rights ought to be exclusive.

[1] See Appendix I., Treaty, Art. 9.

It will do no more than suggest that where the power of readily regaining possession of the seals at sea is found to cease, there the right to vindicate sole ownership must cease also. But it is not necessary to lay claim to the discovery of the true measure of British and American rights in this matter, in order to approve the terms of the proposal made to the Court by Sir Richard Webster for the regulation of the seal fishery in the future. On behalf of Great Britain he proposed that no seal-hunting should be permitted at any time within a zone of 20 miles round the Pribylov Islands, that a close season, from the 15th September until the 1st of July, should be established, during which no pelagic sealing should be permitted in Behring Sea, and, in order to secure the due observance of these regulations, that all sealing vessels should be required to obtain a licence. To say that some such regulations appear to be those which natural law would prescribe, may be only to set up a new butt for the shafts of ridicule with which writers of the analytic and organic schools seem so well supplied. But the principle that there is no right which does not arise from, and continue to depend upon, power, will live and assert itself in spite of derision, and if rights depend upon powers, the extent of the one is the measure of the other.

Mr Phelps has, in the article already alluded to, ventured to admit, for the purposes of argument only, that the waters between the mainland and the Pribylov Islands outside the 3-mile limit are to be regarded as a part of the open sea, and he proceeds to show how numerous are the restrictions to which the freedom even of the open sea has been subjected. The very case of the 3-mile limit he claims as a concession to the principle that where obvious necessities of justice require it, the doctrine of freedom is set aside. He finds further instances in the law of blockade and the right of searching and stopping slave-traders. He infers that the principle involved in these cases should be applied to settle the present difficulty in a sense favourable to the United States. Correct as his conclusion may be, that the freedom of the seas can never authorise injury to the property or just rights of others, which are as sacred at

sea as on shore, it is certain that the analogies he adduces have no application here. The right of a belligerent to stop the commerce of his enemy's ports is a right which only war confers. A "pacific blockade" there never was and never will be. All the pacific blockades of the century,—that which we, in concert with France and Russia, instituted in the Bay of Navarino in 1827, when we blew the Turkish fleet to pieces, while our ambassador remained at Constantinople professing amity with the Sultan, that which we, aided by France, set up over the Argentine Ports in 1845, and that which France lately enforced against Siam,—were truly war measures. They were all enforced against weak States. The first attempt to apply a pacific blockade to a strong power will assuredly demonstrate the real character of the operation. As for the other example upon which Mr Phelps relies, the right of visiting and searching slave-traders, it can be refuted upon the authority of a judge whose decisions have become an integral part of the law of nations. The case of Le Louis[1] in 1817 was that of a French ship captured by an English cruiser on suspicion of being engaged in the slave-trade, and for resisting a search. Sir William Scott (afterwards Lord Stowell) held that the visit and search made by the cruiser were unlawful because no British Act of Parliament could authorise such a proceeding against foreigners. He laid it down that no nation could exercise a right of visit and search upon the high seas save only on a belligerent claim. Nor could he hold the visit made in time of peace justified on the ground that the captured vessel being a slaver was thereby a pirate, for the slave traffic was not piracy or even a crime by the universal law of nations. A nation, he declared, had a right to enforce its own municipal rules and navigation laws so far as such enforcement did not interfere with the rights of others, but it had no right under cover of its municipal regulations to visit and search vessels of other nationalities on the high seas. The case is absolutely in point here. It is true that the slave-trade is now almost in

[1] 2 Dods. Adm. Rep. 210, and Pitt Cobbett's Leading Cases, p. 123. Edn. 1892.

the category of piracy, and it is also true that the Alaska Company's officials have not hesitated to call the seal-fishers pirates. But to rise from these positions to the conclusion that the Great Republic can by Proclamation stop innocent commercial enterprise in a great sea is not an effort of reason but a flight of imagination. Mr Phelps nevertheless undoubtedly succeeded in establishing the main thesis he set himself to prove; that the sea has never been free for any purpose whatever inimical to the just rights of mankind. He might even have gone further, and have shown that the true history of the doctrine is that the sea was never regarded as free until it was recognised that claims to hold the sea in fee far exceeded the powers that professed to vindicate them. It was only when the naval supremacy of one or two great maritime nations was challenged that the doctrine of *mare liberum* began to win favour. It is not that principle which stands in the way of Mr Phelps. Let him show the reality of his right—the validity of that strange claim to ownership in the seals—and no "pirates" will be allowed to pretend that the freedom of the sea permits them to destroy it.

There remains the historical argument that this right of property or property-interest was derived by the United States from Russia, and has been validated by long and continuous exercise. The statement of the American position which has been already quoted from Mr Blaine's despatch of 14th April 1891 would seem to place this right in the very forefront of the dispute. But once again we required to be instructed, and the lesson was read to us this time before the Arbitration Court itself. A keen discussion arose before the tribunal as to whether a supplementary Report submitted by the British Commissioners should be admitted. Mr Carter, the coadjutor of Mr Phelps, maintained that all the evidence on seal life which Britain intended to submit ought to have been included in her Commissioners' Report, as then already lodged, and ought not afterwards to be received. Sir Charles Russell relied upon the express terms of the seventh article of the Treaty

which stipulate that the Report shall be accompanied "with such other evidence as either Government may submit," and construed that as conferring a right to lead evidence regarding regularisation, even after the case and counter-case had been closed under Article 9. In the end, the Court decided that the Report should not be received at that stage, but that Counsel might adopt the arguments contained in it as part of their oral argument. The point is of interest, as showing the American Counsel strongly contending that from the first the dispute had been one about regulation, and that the question of right was a secondary matter imported into the diplomatic correspondence at a later stage. This will be readily recognised as a development in the forensic discussion of the view which Mr Phelps so astutely presented to our Government in 1888, to the effect that the institution of a close time would solve the whole dispute. But the history of the case from 1886 onwards stamps this contention as an ingenious attempt to shift the original controversy to a different and safer ground. There was in 1886 no question of securing the concurrence of England and other powers in establishing international regulations for the seal-fishery. The only matter then agitated was the Americans' right to seize the vessels which they deemed aggressors and convict the crews. Despatch after despatch was launched against the Foreign Office proclaiming the dominant right of the United States to repress the incursions of all foreign fishermen. Primary or secondary, however, this "property-interest" was strongly insisted on as a valuable chattel which the United States had acquired by a good title from Russia, and in the possession of which neither they nor their predecessors had ever been disturbed. The American doctrine of prescription and the facts which are held to prove our acquiescence deserve to be examined.

From the year 1741, when that bold Dane, Vitus Behring, sailing under the flag of Peter the Great from the Siberian side, touched the coast of the American continent, the Russian dominion over that part of the North Pacific Ocean known as the Sea of Kamschatka was paramount

for sixty years. That dominion was expressly asserted in the Ukase of the Emperor Paul issued in 1799, by which the absolute control of the whole region was vested in the Russian-American Company. In 1821 the Emperor Alexander, finding that the Russian trade on the Aleutian Islands and in Russian-America was greatly hindered by secret and illicit traffic, issued an edict excluding all but Russian subjects from trading, whaling, or fishing in those parts, and prohibiting all but Russian vessels from landing on the coasts and islands, and even from approaching them within less than 100 Italian miles. It is not surprising that this preposterous announcement evoked both English and American protests. Mr John Quincy Adams said he could admit no part of the Russian claims. With regard to the pretension of Russia to treat these waters as a close sea, he said: "It may suffice to say that the distance from shore to shore in this sea, in latitude 51° north, is not less than 90° of longitude, or 4000 miles." The Duke of Wellington, on behalf of England, intimated that we could not admit the right of any power possessing the sovereignty of a country to exclude the vessels of others from the seas on its coasts to the distance of 100 miles, and that we objected to the arrangements contained in the ukase conferring upon private merchant ships the right to search in time of peace, as being quite contrary to the laws and usages of nations, and to the practice of modern times. The Duke stated the plain sense of the matter in a despatch to Count Lieven. "We contend that no Power whatever can exclude another from the use of the open sea: a Power can exclude itself from the navigation of a certain coast, sea, &c., by its own act or engagement, but it cannot by right be excluded by another."[1] This fairly hits the vitious premiss which underlies the American claim in the present case. It is true that Mr Blaine cited against Britain certain precedents from her own practice. He pointed to the English Act of

[1] So Calvo:—"Deux ou plusieurs nations sont libres de modifier conventionnellement ce principe; de le restreindre ou de l'étendre; mais ce sont là des dispositions qui les lient entre elles dan leurs relations réciproques sans qu'elles puissent les appliquer et bien moins encore les imposer à d'autres Etats."

Parliament of 1816, forbidding vessels to hover within four-and-twenty miles of St Helena, and the very recent Act closing the whole Moray Firth to trawlers. The answer to this unfortunate attempt to found an analogy upon the St Helena Act is obvious. That Act was admittedly an extraordinary assumption of jurisdiction, and its recognition was only secured by special treaty with the Great Powers—a treaty to which the United States themselves formally acceded. As for the Act which stops free fishing in the Moray Firth, it is plainly based upon the well recognised principle that as the Firth is included within two headlands, both of which belong to the same State, the mode of fishing to be practised in it may be prescribed by that State's municipal enactments. The Act provides that "trawling shall not be used within a line drawn from Duncansby Head, Caithness, to Rattray Point, Aberdeenshire." If it be objected, and it may undoubtedly be fairly objected, that it is an excessive extension of the headland doctrine to legislate for 2700 square miles of sea which hardly present the characteristics of an enclosed bay, it may be granted that the Act is ineffectual against foreigners beyond the 3-mile limit. The only check which could legitimately be placed upon a Norwegian trawler violating the Act would be to refuse to allow her catch to be landed in this country. But if the case be imagined of our founding at some date in the distant future upon this Act, and upon other nations' acquiescence in it as evidenced by their forbearance from all challenge of the Act and from competitive enterprise in the forbidden area, how would our pretension be received? Is there anyone simple enough to suppose that if, forty years hence, the Moray Firth fishing should by some revolution in fish-life become so valuable as to tempt American enterprise, the Bureau at Washington would concede that prescription of the seas had run against them? We may safely credit their diplomatists with penetration and erudition sufficient to scout the unreasonable doctrine, and overwhelm us with legal authority for its repudiation. They would tell us, as the Duke of Wellington told the Russians in 1821, that a nation can by its own engagement

exclude itself even from an open sea, but cannot be excluded by another.

These emphatic protests effected their purpose, and after some negotiation the question was settled by two treaties, one between Russia and the United States (1824), the other between Russia and Great Britain (1825). The first article of the former treaty runs:—"It is agreed that, in any part of the great ocean commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained either in navigation or in fishing." The English treaty contains a similar clause. Now, if ordinary language is to have its ordinary meaning in a State paper, surely this was a distinct abandonment of the Russian position. The American contention, however, is that it was nothing of the sort. The Pacific Ocean or South Sea, says the American Secretary, meant anything but Behring's Sea: Behring's Sea is never mentioned: if it had been included it would have been specifically named: "It is impossible that, in the Anglo-Russian treaty, Count Nesselrode, Mr Stratford Canning, and M. Poletica, could have taken sixteen lines to recite the titles and honours they had received from their respective sovereigns, and not even suggest the insertion of one line, or even word, to secure so valuable a grant to England as the full freedom of the Behring's Sea." The treaties, he maintains, practically withdrew the waters of the north-west coast on the Pacific Ocean from the operation of the ukase; the inference, therefore, is that it remained operative over Behring's Sea. Again, the American Secretary triumphantly asks, why was it that, for forty years after the treaties of 1824 and 1825 were concluded, neither American nor English ships entered Behring's Sea to compete with the Russian-American Company? Does not their abstention raise the strongest presumption of their lack of right, and of their recognised disability?

Perhaps the most astounding assumption in this chain of assertions is that which presupposes that England required to *secure a grant* to enable her citizens to sail and fish in Behring's Sea—required a concession from a naval power

far weaker than herself to entitle her sailors to follow the free-swimming fish, whales, and seals over a stretch of sea 1100 miles broad. But, in point of fact, we waited for no grant. It is an incontrovertible historical fact that from the time of these treaties onwards, foreign vessels fishing in Behring's Sea were never interfered with. It has been stated on the best authority[1] that when the Pacific whale fishery was in its most flourishing state, whole fleets of English, American, and foreign whalers frequented Behring's Sea without let or hindrance.[2] Not only so, but when in 1842 the Russian-American Company urged Russia to stop the operations of American whalers in that sea, she declined, on the express ground that the treaty of 1824 gave to American citizens the right of fishing "over the whole extent of the Pacific Ocean."

But what strength is there in the contention that the term "Pacific Ocean" used in the treaties of 1824 and 1825 excludes Behring's Sea? The American Secretary was at great pains to collate some hundred maps and charts to establish that Behring's Sea was known at the time the treaties were concluded by some specific name distinguishing it from the Pacific—be it Behring's Sea, the Sea of Kamschatka, Bassin du Nord, Mer Dormant, or whatever else. "Is it possible, then," he asked, "that with this cloud of witnesses before the eyes of Mr Adams and Mr George Canning, attesting the existence of the Sea of Kamschatka, they would simply include it in the phrase

[1] Bancroft's *History of the Pacific States*, vol. xxviii.

[2] Mr Charles H. Ewart of Millbush, Dalbeattie, writes of his own experiences as one of the crew of an American whaler sailing from New Bedford:—"We caught whales in the Behring Sea during 1857-58-59. Our common ractice was to leave the Hawaiian Islands in the month of March, and go north to the Behring Sea, thence into the Gulf of Anadir, and afterwards moving down the east coast of Kamschatka, we went through what was called the 50′ passage in the Kurile islands into the Okhotsk Sea. We hunted and caught whales in all these seas without let or hindrance. If the Russians had been inclined to place any restrictions on whale fishing at all, they would surely have done it in the Okhotsk, which is virtually inland sea. I have been ashore in every town and hamlet in the Okhotsk, and, even where there were military establishments, instead of any restrictions being placed on our coming and going, we were received with the utmost cordiality, and I remained in the Pacific until 1870, and I never at any time heard of any proposal to interfere with whale ships."

'Pacific Ocean'? Is it possible that Mr Canning and Mr Adams would believe that they were acquiring for the United States and Great Britain the enormous rights inherent in the Sea of Kamschatka without the slightest reference to that sea, or without any description of its metes and bounds, when neither of them would have paid for a village house-lot, unless the deed for it should recite every fact and feature necessary for the identification of the lot against any other piece of ground on the surface of the globe?" Against this "cloud of witnesses" Lord Salisbury set a list of ordinary works of reference in which the Pacific Ocean is used as including that sea. His general answer was an analogical argument establishing the absolute propriety of the designation used in the treaties. He cited the Gulf of Lyons and the Bay of Biscay, which, though enjoying separate particular names, are surely to be held as parts of the Mediterranean and of the Atlantic respectively. But there is direct contemporaneous evidence that "Pacific Ocean" was the term officially recognised as covering what is now known as Behring's Sea. The Russian Minister, writing to Mr Adams in 1822, declares that "the Russian possessions *in the Pacific Ocean* extend on the north-west coast of America from Behring's Straits to the 51st degree of north latitude." Again, in a paper accompanying Mr Adams's instructions sent in 1823 to Mr Middleton (who was at that time American Minister at St Petersburg), this passage occurs:—"The right of navigation and fishing *in the Pacific Ocean*, even on the Asiatic coast north of latitude 45°, can as little be interdicted to the United States as that of traffic with the natives of North America." This language, be it remembered, is used with express reference to Russia's claim to exclusive jurisdiction over the sea from Behring's Strait down to 45° 50′ on the American coast.

But the American diplomatists may be left to make the most of their giddy footing on this narrow ledge of reasoning from the content of a term. Let any man come down to broader ground, and read the treaty of 1824 in the light of the ukase which preceded it, and then say whether he can come to any other decision than that so explicitly enun-

ciated by Calvo, who declares that that convention secured freedom of navigation and fishery, "*dans toute l'étendue de l'Ocean Pacifique.*" The Russian edict, upon the narrative that the proper regulation of traffic required the establishment of boundaries for navigation on the north-west coast of America, the coast of Siberia, and among the Aleutian Islands, prohibited all commerce and navigation on or in "all islands, ports and gulfs, including the whole of the north-west coast of America, beginning from Behring's Straits to the 51st degree of north latitude." That was the gigantic claim put forward by Russia; that was the pretension which the United States and Great Britain set themselves to overthrow. If the treaties which professed to settle that question in a sense favourable to the Americans and to us really have no application north of the Aleutian chain, how were we deluded? Never did Russian diplomacy achieve so blindly fortunate a victory. And yet, if it was Count Nesselrode's conscious but tacit intention to preserve all his sovereign's high prerogatives in Behring's Sea, never did Russian plenipotentiary put his hand to a convention so unfortunate in its phraseology. Look at the third article of the deed: "There shall not be formed by the citizens of the United States any establishment upon the north-west coast of America, nor in any of the islands adjacent, to the north of 54° 40′ of north latitude, and in the same manner there shall be none formed by Russian subjects south of the same parallel." This provision regarding the territory of the United States may have been only a particular enunciation of the famous doctrine promulgated only a few months before by President Monroe, interdicting all future European colonisation on the American continent. But why should Russia have sought or accepted such a stipulation for her domain? By the terms of the hypothesis there was left standing in full validity her haughty inhibition barring even navigation in the sea north of the Aleutian peninsula. Yet here she exacts merely a prohibition of establishments on shore, knowing, as well she knew, that upon the most approved canons of construction this clause would in the future be construed against her; that it would

be read as no mere supererogatory provision, but as really derogating from her loftier pretension to exclude all commerce from Behring's Sea.

And how stands this matter in the treaty of 1867? Let us occupy for a moment Mr Blaine's standpoint. Here was Mr Seward framing a deed of cession that was to convey infinitely more than the treaty of 1824 carried. He had before him that treaty fixing the right of American sailors to trade over the North Pacific Ocean—a treaty which upon this assumption stopped short at the Aleutian chain, and left Behring's Sea a forbidden area. Jealous as he must have been "to recite every fact and feature" of the territory, and precise as he ought to have been in his specification of its "metes and bounds," he actually defines a part of Behring's Sea by the perilous misnomer "North Pacific Ocean." There is no room for doubt on the point. The western limit of the ceded territory, according to the second article of the treaty, runs "in a south-westerly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group *in the North Pacific Ocean.*" Now, for the first-named island it might be said it was on the boundary between the Pacific Ocean proper and Behring's Sea, and might be described as lying in either. But no such evasion is possible about the other. Copper Island lies 100 miles north of Attou, as much and as unequivocally in Behring's Sea as ever were the Pribylov Islands themselves, and yet here we find it stamped with the American State-Office mark as belonging to the North Pacific Ocean. Nor is the case better if we regard the actual dispositive clauses of the conveyance of 1867. By the first article, Russia cedes "all the territory and dominion now possessed by his said Majesty *on the continent of America and in the adjacent islands;* and the sixth article explains that "the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto." There is not one word of *sea*, or dominion over any sea. In the face of the protests of 1821, denying and successfully opposing the Russian claim to exclude vessels from a sea-

belt of 100 miles, we are asked to believe that the United States in 1867 paid valuable consideration for the right to shut out fishing vessels from countless leagues of the open ocean. In the face of the late insistence upon the paramount duty of state draftsmen to recite every fact and feature of the territory they describe, we are asked to believe that the United States were content to have this costly acquisition mentioned as a right in the territory or an appurtenance thereto without any more elaborate specification.

It has been suggested that, though no sea was expressly conveyed by the Treaty of 1867, the limits of the ceded region as there laid down are sufficient to include the whole of Behring Sea, which should therefore be held as conveyed by implication. It will be observed that in the Treaty the eastern and western boundaries are stated with great precision, but that neither a northern nor a southern boundary is given. The eastern boundary in its course northward becomes coincident with the 141st degree of west longitude, and the western boundary from a point in Behring Straits northwards is identical with another meridian. As these meridians meet only at the Pole, there is no reason why the territory they are said to delimit should stop short at Behring Straits. If the United States' title is to be measured by these bounds, the President's Proclamation can exclude rival enterprise from a large part of the Arctic Ocean as well as set up a monopoly in the eastern part of Behring Sea. The want of a specific southern boundary has, for the purposes of the United States' argument, been supplied by the hypothesis that the Aleutian Archipelago constitutes a "firm pelagic boundary" in that direction. That this theory has been thought worth discussing is probably due mainly to the fascination of the phrase. In order to dismiss it, it seems enough to state that a boundary line drawn from island to island of the archipelago would cross open spaces of sea, varying from 20 to 80 miles in width, and, unless produced beyond the land's end of the last of the islands, would fall far short of the western Treaty limit. Such a boundary

may be "pelagic," but neither in respect of its constitution nor of its terminus can it be said to be "firm."

The conclusion which this analysis seems to warrant is that the American case, so far as it is based on the title given by Russia, is not borne out by a fair interpretation of the deed of cession; that, so far as it claims to be supported by exclusive possession and our acquiescence therein, it is not founded on fact; and, that so far as it rests on a pretended property-interest in the seals themselves, it is sanctioned neither by fact nor by law. But after this is said, it remains to acknowledge the irresistible force of Mr Phelps's demand that the law by international convention, or whatever other means is invoked to supply the want of an international legislature, shall forbid the wanton and wasteful destruction of a rare and valuable animal. Such a prohibition ought to be enforced not to protect the phantom of State-ownership in a wild animal, but to vindicate the right of the animals themselves to live and multiply after their kind.

After reviewing the arguments that have been presented for the United States, one is tempted to ask whether this is the same nation which, through one hundred years of strife, has employed every argument that diplomatic ingenuity could suggest, every method which prohibitory tariffs could devise, to compel England to throw open the inshore fisheries of Canada and Newfoundland; which has maintained that "the deep-sea fisherman, pursuing the free-swimming fish of the ocean with his net or his leaded line, not touching shores or troubling the bottom of the sea, is no trespasser though he approach within three miles of a coast by any established recognised law of nations;" which contended before the Halifax Commission, in 1877, that "the territorial waters of the British North American provinces on the Atlantic coast comprise only that portion of the sea lying within a marine league of the coast, and also the interior of such bays and inlets as are less than six miles wide between their headlands; while all larger bodies of water are parts of the free and open ocean." Do the fishermen who go down from Marblehead and Gloucester

and carry back rich cargoes from the Canadian bays sail under the same flag that flies over the cruisers which seize Canadian vessels seventy miles from the shores of Alaska?

The Award of the Arbitrators has now been delivered. To the five specific questions[1] addressed to them, the Arbitrators have given the following answers :—

1. That by the Ukase of 1821, Russia claimed jurisdiction in the sea, now known as Behring Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but in the course of the negotiations which led to the treaties of 1824 with the United States, and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from the shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact, or exercised any exclusive jurisdiction in Behring Sea or any exclusive right in the seal-fisheries therein beyond the ordinary limit of territorial waters.

2. That Great Britain did not recognise or concede any claim upon the part of Russia to exclusive jurisdiction as to the seal-fisheries in Behring Sea outside of the ordinary territorial waters.

3. That the body of water known as Behring Sea was included in the phrase "Pacific Ocean" as used in the said Treaty, and that no exclusive rights as to the seal-fisheries therein were held or exercised by Russia outside of ordinary territorial waters, after the Treaty of 1825.

4. That all the rights of Russia as to jurisdiction and as to seal-fisheries in Behring Sea east of the water-boundary in the Treaty of Cession, did pass unimpaired to the United States under the said Treaty.

5. That the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary 3-mile limit.

[1] See Art. VI. of Arbitration Treaty in Appendix I.

The regulations in which Great Britain is required to concur are :—

1. That no seals be killed at any time within a zone of 60 miles round the Pribylov Islands.

2. That a close time be established, running from 1st May to 31st July in each year, during which period no seal shall be killed on the high sea in that part of the Pacific Ocean, inclusive of Behring Sea, which is situated to the north of the 35th degree of north latitude and eastward of the 180th degree of longitude from Greenwich till it strikes the water-boundary described in Article I. of the Treaty of 1867, between the United States and Russia, and following that line up to Behring Straits.[1]

3. That only sailing vessels shall be permitted to engage in fur-seal fishing, even during the period and in the area in which such fishing is legal.

The subsidiary regulations provide that these sailing vessels shall be licensed, and shall keep an accurate record of their operations, and that no nets, firearms, or explosives shall be used by the seal hunters, shot guns only excepted when used during the open season and outside Behring Sea.

After the issue of the Arbitration has been reached, it may seem ungracious to look back upon the arguments advanced by either of the disputants. It is enough that the historical questions have been answered in a sense favourable to the British contentions, and that the questions which involve the application of international law have been settled in harmony with authority. The decision of the tribunal is unquestionably a triumph for England on all the questions put in issue. It is equally certain that the material advantage accruing from the prescribed regulations rests with the United States. It was not within the province of the Arbitrators to take cognizance of the methods of seal-killing employed on land, nor were they empowered to declare that the close-time should apply to the islands. All they have found themselves able to do is to make a recommendation that both Powers should devise and enforce some

[1] See Map.

regulations for seal-hunting both on land and within territorial waters.[1] The result is that the Alaska Company is left in the enjoyment of the sole right to take seals during the close-time. The Company's practice in the past affords no guarantee that the privilege will be used in such a way as to ensure the perpetuation of the seal species, and it is more than probable that when the regulations come to be re-examined five years hence, it will be found necessary to insist upon some restriction of the island-catch. In another particular the regulations seem to be open to grave objection. The Victorian fishermen are now interdicted from employing steamers or firearms in the prosecution of an innocent commercial enterprise on the high seas, even at those periods when the humane restrictions of the close-time are not in force. This provision extinguishes a Canadian industry at one blow, and guarantees that, for at least five years, the Alaska Company shall enjoy a monopoly that extends over the sea as well as over the land. It protects the animals from being shot at sea that they may be clubbed on shore. It vindicates for the United States a right of property which the Arbitrators expressly declared to have no existence, and lays the Canadian Sealers under a heavier embargo than if all Behring Sea had been legally constituted a "Federal preserve."

It is not conceivable that the difficulty now settled, or at least placed upon a basis for settlement, could ever have caused a serious rupture between two great peoples sprung from a common stock and speaking a common language. But the victory England has achieved ought to do something more than flatter our statesmen. It ought to teach them that the true way to win the respect of our kinsfolk in the United States and the affection of our brothers in Canada is to show a clear appreciation of the importance of the issues that depend between them, and an unswerving firmness in maintaining what we are satisfied are the rights of our dependency. The seal fishery is a trifle beside the great fishery interests of Canada and Newfoundland on the Atlantic. These constitute a great source of national wealth.

[1] See Recommendations, p. 54.

It is not too much to say that they intimately concern the future stability and security of the Empire, and if the Behring Sea controversy had done nothing more than illustrate the excessive pretensions which Canadians have to combat in their efforts to preserve their greatest national industry, it would have done something to correct that vacillation and incompetence which Canadian fishermen have too much reason to regard as a tradition of our Colonial policy.

APPENDIX I.

TREATY BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA, ARBITRATION RESPECTING THE SEAL FISHERIES IN BEHRING'S SEA.

Signed at Washington, February 29, 1892.

[*Ratifications exchanged at London, May* 7, 1892.]

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the United States of America, being desirous to provide for an amicable settlement of the questions which have arisen between their respective Governments concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters, have resolved to submit to arbitration the questions involved, and to the end of concluding a Convention for that purpose have appointed as their respective Plenipotentiaries:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Sir Julian Pauncefote, G.C.M.G., K.C.B., Her Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States; and the President of the United States of America, James G. Blaine, Secretary of State of the United States;

Who, after having communicated to each other their respective Full Powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:—

ARTICLE I.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters, shall be

submitted to a Tribunal of Arbitration, to be composed of seven Arbitrators, who shall be appointed in the following manner, that is to say: two shall be named by Her Britannic Majesty; two shall be named by the President of the United States; his Excellency the President of the French Republic shall be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy shall be so requested to name one; and His Majesty the King of Sweden and Norway shall be so requested to name one. The seven Arbitrators to be so named shall be jurists of distinguished reputation in their respective countries; and the selecting Powers shall be requested to choose, if possible, jurists who are acquainted with the English language.

In case of the death, absence, or incapacity to serve of any or either of the said Arbitrators, or in the event of any or either of the said Arbitrators omitting or declining or ceasing to act as such, Her Britannic Majesty, or the President of the United States, or his Excellency the President of the French Republic, or His Majesty the King of Italy, or His Majesty the King of Sweden and Norway, as the case may be, shall name, or shall be requested to name forthwith, another person to act as Arbitrator in the place and stead of the Arbitrator originally named by such head of a State.

And in the event of the refusal or omission for two months after receipt of the joint request from the High Contracting Parties of his Excellency the President of the French Republic, or His Majesty the King of Italy, or His Majesty the King of Sweden and Norway, to name an Arbitrator, either to fill the original appointment or to fill a vacancy as above provided, then in such case the appointment shall be made or the vacancy shall be filled in such manner as the High Contracting Parties shall agree.

ARTICLE II.

The Arbitrators shall meet at Paris within twenty days after the delivery of the counter-cases mentioned in Article IV., and shall proceed impartially and carefully to examine and decide the questions that have been or shall be laid before them as herein provided on the part of the Governments of Her Britannic Majesty and the United States respectively. All questions considered by the Tribunal, including the final decision, shall be determined by a majority of all the Arbitrators.

Each of the High Contracting Parties shall also name one person to attend the Tribunal as its Agent to represent it generally in all matters connected with the arbitration.

ARTICLE III.

The printed Case of each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to each of the

Arbitrators and to the Agent of the other party as soon as may be after the appointment of the members of the Tribunal, but within a period not exceeding four months from the date of the exchange of the ratifications of this Treaty.

ARTICLE IV.

Within three months after the delivery on both sides of the printed Case, either party may, in like manner, deliver in duplicate to each of the said Arbitrators, and to the Agent of the other party, a counter-case and additional documents, correspondence, and evidence, in reply to the case, documents, correspondence, and evidence so presented by the other party.

If, however, in consequence of the distance of the place from which the evidence to be presented is to be procured, either party shall, within thirty days after the receipt by its Agent of the case of the other party, give notice to the other party that it requires additional time for the delivery of such counter-case, documents, correspondence, and evidence, such additional time so indicated, but not exceeding sixty days beyond the three months in this Article provided, shall be allowed.

If in the case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within thirty days after delivery of the Case; and the original or copy so requested shall be delivered as soon as may be, and within a period not exceeding forty days, after receipt of notice.

ARTICLE V.

It shall be the duty of the Agent of each party, within one month after the expiration of the time limited for the delivery of the counter-case on both sides, to deliver in duplicate to each of the said Arbitrators and to the Agent of the other party a printed argument showing the points and referring to the evidence upon which his Government relies, and either party may also support the same before the Arbitrators by oral argument of Counsel; and the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by Counsel, upon it; but in such case the other party shall be entitled to reply either orally or in writing, as the case may be.

ARTICLE VI.

In deciding the matters submitted to the Arbitrators, it is agreed that the following five points shall be submitted to them, in order

that their award shall embrace a distinct decision upon each of said five points, to wit :—

1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain?

3. Was the body of water now known as the Behring's Sea included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary 3-mile limit?

ARTICLE VII.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination, the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit.

The High Contracting Parties furthermore agree to co-operate in securing the adhesion of other Powers to such Regulations.

ARTICLE VIII.

The High Contracting Parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it; and, being solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions, do agree that either may submit to the Arbitrators any question of fact involved in said

claims, and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.

ARTICLE IX.

The High Contracting Parties having agreed to appoint two Commissioners on the part of each Government to make the joint investigation and Report contemplated in the preceding Article VII., and to include the terms of the said Agreement in the recent Convention, to the end that the joint and several Reports and recommendations of said Commissioners may be in due form submitted to the Arbitrators, should the contingency therefor arise, the said Agreement is accordingly herein included as follows :—

Each Government shall appoint two Commissioners to investigate, conjointly with the Commissioners of the other Government, all the facts having relation to seal-life in Behring's Sea, and the measures necessary for its proper protection and preservation.

The four Commissioners shall, so far as they may be able to agree, make a joint Report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree.

These Reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators cannot arise.

ARTICLE X.

Each Government shall pay the expenses of its members of the Joint Commission in the investigation referred to in the preceding Article.

ARTICLE XI.

The decision of the Tribunal shall, if possible, be made within three months from the close of the argument on both sides.

It shall be made in writing and dated, and shall be signed by the Arbitrators who may assent to it.

The decision shall be in duplicate, one copy whereof shall be delivered to the Agent of Great Britain for his Government, and the other copy shall be delivered to the Agent of the United States for his Government.

ARTICLE XII.

Each Government shall pay its own Agent, and provide for the proper remuneration of the Counsel employed by it and of the Arbitrators appointed by it, and for the expense of preparing and submitting its case to the Tribunal. All other expenses connected with the arbitration shall be defrayed by the two Governments in equal moieties.

ARTICLE XIII.

The Arbitrators shall keep an accurate record of their proceedings, and may appoint and employ the necessary officers to assist them.

ARTICLE XIV.

The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators.

ARTICLE XV.

The present Treaty shall be duly ratified by Her Britannic Majesty and by the President of the United States of America, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged either at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this Treaty, and have hereunto affixed our seals.

Done in duplicate, at Washington, the 29th day of February 1892.

(L.S.) JULIAN PAUNCEFOTE.
(L.S.) JAMES G. BLAINE.

APPENDIX II.

The following is the text of the Award which is dated 15th August 1893. The preliminary clauses reciting the terms of the Arbitration Treaty are omitted, as well as the findings upon the facts involved in Great Britain's claim for compensation in respect of the vessels seized.

* * * * * * * *

"And whereas the President of the United States of America named the Honourable John M. Harlan, Justice of the Supreme Court of the United States, and the Honourable John T. Morgan, Senator of the United States, to be two of the said Arbitrators; and Her Britannic Majesty named the Right Honourable Lord Hannen and the Honourable Sir John Thompson, Minister of Justice and Attorney-General for Canada, to be two of the said Arbitrators; and his Excellency the President of the French Republic named the Baron de Courcel, Senator, Ambassador of France, to be one of the said Arbitrators; and his Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the kingdom of Italy, to be one of the said Arbitrators; and His Majesty the King of Sweden and Norway named M. Gregers Gram, Minister of State, to be one of the said Arbitrators;

"And whereas we, the said Arbitrators, having duly met at Paris, have proceeded impartially and carefully to examine and decide all the questions submitted to us, the said Arbitrators, under the said treaty laid before us, as provided in the said treaty on the part of the Government of Her Britannic Majesty and of the United States respectively;

"Now we, the said Arbitrators, having impartially and carefully examined the said questions, do, in like manner by this our award, decide and determine the said questions in manner following—that is to say, we decide and determine as to the five points mentioned in Article VI., as to which our award is to embrace a distinct decision upon each of them.

"As to the first of the said five points, we, the said Baron de Courcel, Mr Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and M. Gregers Gram, being a majority of the said Arbitrators, do decide and determine as follows:—

"By the Ukase of 1821 Russia claimed jurisdiction in the sea now known as the Behring Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but in the course of the negotiations which led to the conclusion of the treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring Sea, or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.

"As to the second of the said five points, we, the said Baron de Courcel, Mr Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and M. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that Great Britain did not recognise or concede any claim upon the part of Russia to exclusive jurisdiction as to the seal fisheries in Behring Sea outside of ordinary territorial waters.

"As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia, we, the said Arbitrators, do unanimously decide and determine that the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean," as used in the said treaty. And as to so much of the said third point as requires us to decide what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said treaty of 1825, we, the said Baron de Courcel, Mr Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and M. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to the seal fisheries therein were held or exercised by Russia outside of ordinary territorial waters after the treaty of 1825.

"As to the fourth of the said five points, we, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between the United States and Russia of March 30, 1867, did pass unimpaired to the United States under the said treaty.

"As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and M. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit.

* * * * * * * *

"And whereas the aforesaid determination of the foregoing question as to the exclusive jurisdiction of the United States mentioned in Article VI. leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the Tribunal having decided by a majority as to each Article of the following regulations, we, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta, and M. Gregers Gram, assenting to the whole of the nine Articles of the following regulations, and being a majority of the said Arbitrators, do decide and determine, in the mode provided by the treaty, that the following concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and that they should extend over the waters hereinafter mentioned, that is to say:—

ARTICLE I.

The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture, or pursue, at any time and in any manner whatever, the animals commonly called fur-seals within a zone of 60 miles around the Pribyloff Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles of 60 to a degree of latitude.

ARTICLE II.

The two Governments shall forbid their citizens and subjects respectively to kill, capture, or pursue, in any manner whatever, during the season extending each year from the 1st of May to the 31st of July, both inclusive, the fur-seals on the high sea in that part of the Pacific Ocean, inclusive of the Behring Sea, which is situated to the north of the 35th degree of North latitude and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article I. of the Treaty of 1867 between the United States and Russia, and following that line up to Behring Straits.

ARTICLE III.

During the period of time, and in the waters in which the fur-seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will, however, be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails as are in common use as fishing boats.

ARTICLE IV.

Each sailing vessel authorised to fish for fur-seals must be provided with a special licence issued for that purpose by its Government, and shall be required to carry a distinguishing flag to be prescribed by its Government.

ARTICLE V.

The masters of the vessels engaged in fur-seal fishing shall enter accurately in their official log-book the date and place of each fur-seal fishing operation, and also the number and sex of the seals captured upon each day. These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

ARTICLE VI.

The use of nets, firearms, and explosives shall be forbidden in the fur-seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring Sea during the season when it may be lawfully carried on.

ARTICLE VII.

The two Governments shall take measures to control the fitness of the men authorised to engage in fur-seal fishing These men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE VIII.

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur-seal fishing in canoes or undecked boats not transported by or used in connection with other vessels, and propelled wholly by paddles, oars, or sails, and manned by not more than five persons each, in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons, and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur-seals outside of territorial waters under contract for the delivery of the skins to any person.

This exemption shall not be construed to affect the municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian passes.

Nothing herein contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur-sealing vessels as heretofore.

ARTICLE IX.

The concurrent regulations hereby determined with a view to the protection and preservation of the fur-seals shall remain in force until they have been in whole or in part abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

Appended to the Award are the following recommendations made by the Arbitrators to the Governments of the United States and Great Britain.

"1. The Arbitrators declare that the concurrent regulations as determined upon by the Tribunal of Arbitration by virtue of Article VII. of the Treaty of the 29th of February 1892, being applicable to the high sea only, should, in their opinion, be supplemented by other regulations applicable within the limits of the sovereignty of each of the two Powers interested and to be settled by their common agreement.

"2. In view of the critical condition to which it appears certain that the race of fur-seals is now reduced in consequence of circumstances not fully known, the Arbitrators think fit to recommend both Governments to come to an understanding in order to prohibit any killing of fur-seals, either on land or at sea, for a period of two or three years, or at least one year, subject to such exceptions as the two Governments might think proper to admit of.

"Such a measure might be recurred to at occasional intervals if found beneficial.

"3. The Arbitrators declare, moreover, that, in their opinion, the carrying out of the regulations determined upon by the Tribunal of Arbitration should be assured by a system of stipulations and measures to be enacted by the two Powers, and that the Tribunal must in consequence leave it to the two Powers to decide upon the means for giving effect to the regulations determined upon by it."

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